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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 986

MARSH SUPERMARKETS, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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MARSH SUPERMARKETS, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Marsh Supermarkets, Inc., herein called the petitioner, petitions for a writ of certiorari to review the decree of the United States Court of Appeals for the Seventh Circuit enforcing, as modified, an order of the National Labor Relations Board, herein called the respondent or the Board, against the petitioner.

Opinions Below

The opinion of the court of appeals (Appendix A, pp. 15 to 19, *infra*) is reported at 327 F. 2d 109. The decision and order of the Board (R.A. 5a to 12a) [1] is reported at

[1] "R.A." refers to respondent's appendix in the court of appeals and "P.A." refers to petitioner's appendix in the court of appeals. "T." refers to transcript of testimony before the trial examiner and "C.A." refers to proceedings before the court of appeals.

140 NLRB No. 83. The intermediate report (R.A. 14a to 42a) and the supplemental intermediate report (R.A. 43a to 50a) of the trial examiner are unreported.

Jurisdiction

The decree of the court of appeals (Appendix B, pp. 20 to 24, *infra*) was made and entered on January 10, 1964. The order of the court of appeals denying petitioner's timely petition for rehearing was entered on March 4, 1964. The jurisdiction of this Court is invoked under 62 Stat. 928 (28 U.S.C. Sec. 1254(1)) and under 61 Stat. 6, as amended (29 U.S.C. Sec. 160(e)).

Questions Presented

1. Whether the portions of the Board's original decision and order, as enforced by the court of appeals, which are based upon, or which grow out of, petitioner's conduct prior to the first election at the Yorktown warehouse were rendered moot by the Board's supplemental decision overruling the union's objections to petitioner's conduct and certifying the results of a subsequent election at the Yorktown warehouse.

2. Whether, under the circumstances of this case, the decree of the court of appeals was too broad in its proscription of petitioner's conduct with respect to not only the particular union involved herein but also any other labor organization; and with respect to all of its employees, whether at Muncie and Yorktown or elsewhere; and with respect to any manner of conduct by petitioner besides the particular conduct found unlawful in this case.

3. Whether the Board may use petitioner's statements privileged under Section 8(c) of the Act to show petitioner's "hostility" to the union and then base findings of Sections 8(1) and 8(a)(3) violations on such hostility.

4. Whether petitioner's statement of its legal position, that bargaining would "start from scratch" constitutes a violation of Section 8(a)(1) of the Act.

5. Whether petitioner interrogated an employee by asking if he was "going to make the right vote."

6. Whether the Board's finding that the discharge of employee Farinella was in violation of Section 8(a)(3) and (1) and the attendant order of his reinstatement are contrary to Section 10(c) of the Act.

Federal Statute Involved

The pertinent portions of the National Labor Relations Act (61 Stat. 136, as amended; 29 U.S.C. Sec. 151 et seq.), herein called the Act, are set forth in Appendix C to this petition at pages 25 to 28.

Statement of the Case

On April 21, 1961, the Retail Clerks International Association, Local Union No. 1441, AFL-CIO, herein called the Union, lost a decertification election at petitioner's six retail stores in Muncie, Indiana (Case No. 25-RD-120) and also lost a representation election at petitioner's warehouse in Yorktown, Indiana (Case No. 25-RC-1865). The Union filed objections to both elections and an unfair labor practice charge against the petitioner (Case No. 25-CA-1407).

Following a consolidated hearing on the objections and the complaint on the unfair labor practice charge, the trial examiner issued his report (R.A. 14a to 42a) finding and concluding that: (1) the Muncie stores election should be set aside because petitioner had made a promise to employee Katherine Swoveland and had interrogated employee Ray Taylor in violation of Section 8(a)(1) of the Act and such conduct had affected the results of the election; (2) the

Yorktown warehouse election should not be set aside and petitioner's conduct at Yorktown was not in violation of the Act; (3) the discharge of employee John Farinella by petitioner was in violation of Section 8(a)(3) and (1) of the Act; and (4) the petitioner did not violate the Act by shortening the hours of work of employee Zelpha Wulff.

By its order dated June 7, 1962 (R.A. 13a) the Board remanded the case to the trial examiner for resolutions of credibility, findings of fact and conclusions of law with respect to certain pre-election statements and speeches by petitioner and with respect to certain post-election conversations between employee Wulff and supervisor Franklin.

The trial examiner's supplemental report (R.A. 43a to 50a) dated June 21, 1962, resolved the credibility issue as to petitioner's pre-election speeches and found that the speeches were privileged under Section 8(c) of the Act, as he had found in his original report (R.A. 18a); and, after resolving questions of credibility, the report concluded that supervisor Franklin's statements to employee Wulff on April 28, 1961, and on June 1, 1961, were implied threats of discharge and in violation of Section 8(a)(1) of the Act.

The Board, in its decision dated January 28, 1963 (R.A. 5a to 12a), concluded that not only the Muncie stores election but also the Yorktown warehouse election should be set aside since, contrary to the trial examiner, it found that petitioner's pre-election speeches at the stores and at the warehouse contained threats of loss of benefits and economic reprisal which interfered with the results of the election and also violated Section 8(a)(1) of the Act.

The Board did agree with the trial examiner that petitioner had discharged employee Farinella in violation of Section 8(a)(3) and (1) of the Act and that supervisor Franklin's statements to employee Wulff on two occasions were in violation of the Act. However, the Board, in op-

position to the trial examiner, found that petitioner failed to restore employee Wulff's straight-time hours during the two weeks ending June 3, 1961, in violation of Section 8(a)(3) and (1) of the Act.

Pursuant to the Board's decision and order, a second representation election was conducted among the employees at petitioner's Yorktown warehouse (Case No. 25-RC-1865) on May 23, 1963; the Union again lost this second election and filed its objections with the Regional Director for the Twenty-fifth Region of the Board. The regional director's report, dated July 12, 1963, recommended that the Union's objections to petitioner's conduct be overruled and that the results of the election be certified. On August 2, 1963, the Board's supplemental decision and certification (Appendix D, pp. 29 to 30, *infra*) adopted the regional director's recommendations that the Union's objections be overruled and certified that the Union did not represent petitioner's employees at the Yorktown warehouse (Case No. 25-RC-1865).

Meanwhile, however, the Board had filed its petition, dated June 4, 1963, for enforcement of its original decision and order dated January 28, 1963, with the Court of Appeals for the Seventh Circuit invoking federal jurisdiction under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Secs. 151, *et seq.*, as amended by 73 Stat. 519) (R.A. 3a).

The court of appeals concluded that the Board did not err in finding: that petitioner's pre-election speeches at Muncie and Yorktown were in violation of the Act and that both elections should be set aside; the petitioner's statements to Taylor and Wulff also violated the Act; and that Farinella's discharge was in violation of Section 8(a)(3) and (1) of the Act. In so doing, the court of appeals rejected petitioner's contention that the certification of results

of the second election at Yorktown rendered moot that portion of the Board's order based upon conduct at Yorktown.

However, the court of appeals disagreed with the Board and found that there was no substantial evidence on the record considered as a whole that employee Wulff's straight-time hours had been reduced in violation of the Act.

The court of appeals, therefore, granted enforcement of the Board's order as modified (deleting the portion as to Wulff). The court's decree (Appendix B, pp. 20 to 24, *infra*) was entered on January 10, 1964, over petitioner's objections thereto.

Reasons for Granting the Writ

1. The decision of the court of appeals that the portions of the Board's original order relating to petitioner's conduct prior to the first election at the Yorktown warehouse were not rendered moot by the Boad's subsequent determination of no improper conduct by petitioner prior to the second election at the Yorktown warehouse is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *General Engineering, Inc.*, v. *N.L.R.B.*, 311 F. 2d 570 (9th Cir. 1962).

The court of appeals in this case stated that it would not follow the *General Engineering* decision, apparently recognizing that its decision would be in conflict with the decision of the Ninth Circuit.

Instead, the court of appeals erroneously relied upon the decision of the Court of Appeals for the Second Circuit in *N.L.R.B.* v. *Clark Bros. Co.*, 163 F. 2d 373 (2nd Cir. 1947), which cited no authority for its pronouncement on the issue of mootness and which was decided prior to this Court's criticism of the standard of review of Board decisions being

applied by the Second Circuit and certain other courts of appeals., *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S., 474, 490 (1951). The decision in *Clark Bros. Co.* also failed to refer to the decision of this Court in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.* (331 U.S. 416 (1947)) decided two months before the Second Circuit case and relied upon by the Ninth Circuit in *General Engineering, Inc.* v. *N.L.R.B.*, 311 F. 2d 570.

In the instant case, as in *General Engineering, Inc.*, the Board is seeking enforcement of an order because petitioner might commit the same illegal acts again, but at the same time, is admitting that petitioner did not commit any unlawful act prior to a subsequent election. (Appendix D, pp. 29 to 30, *infra.*)

This Court has admonished the courts of appeals to assume more responsibility for the reasonableness and fairness of Board orders. The issue presented by this conflict between two courts of appeals is not merely a formalistic one; the issue is whether the Board can use petitioner's antecedent conduct in invoking the discretion of the court of appeals even though the Board itself has subsequently absolved petitioner of any misconduct with respect to a second election. Unless this Court considers this question and adopts the decision of the Ninth Circuit in *General Engineering, Inc.*, the Board will continue to unnecessarily invoke the equitable jurisdiction of the courts of appeals, and the courts of appeals will continue to merely affirm or disaffirm the Board rather than determining whether, under all the circumstances, the Board's order *should* be granted judicial enforcement.

2. The decree of the court of appeals (Appendix B, pp. 20 to 23, *infra*) requiring petitioner to cease and desist from "in any other manner" interfering with, restraining

or coercing its employees is in conflict with the decision of this Court in *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426 (1941) since there was no evidence here that petitioner intended to continue or was continuing its efforts to discourage employee rights under the Act; on the contrary, the Board's own finding of no improper conduct by petitioner as to the second election at Yorktown is evidence that petitioner was not continuing any unlawful conduct.

The decree of the court of appeals proscribing petitioner's activities with respect to this particular Union and "any other labor organization" is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *N.L.R.B.* v. *Atlanta Coca-Cola Bottling Co., Inc.*, 293 F. 2d 300 (5th Cir. 1961.) *Cf. also N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961); *N.L.R.B.* v. *Brandman Iron Co.*, 368 U.S. 399 (1962).

The extension of the scope of the court's decree to all of petitioner's locations besides Muncie and Yorktown, Indiana, is in conflict with the court of appeals' own decision in *Reliance Mfg. Co.* v. *N.L.R.B.*, 125 F. 2d 311 (7th Cir. 1941). *Cf. N.L.R.B.* v. *Thompson Ramo Woolridge, Inc.*, 305 F. 2d 807 (7th Cir. 1962); *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F. 2d 709 (5th Cir. 1963).

Petitioner objected to the form and scope of the order before the court of appeals and before the Board in its exceptions to the intermediate report of the trial examiner filed with the Board on April 4, 1962. Therefore, the instant case presents a question which has not been, but should be settled by this Court. *See N.L.R.B.* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961).

Under a decree as broad as the one entered herein by the court of appeals, Section 10 of the Act would be eliminated as to petitioner: all future activities of *any* kind by petitioner in violation of the Act as to *any* labor organization at *any* of petitioner's locations would be subject to

scrutiny by the court of appeals and automatically punishable by contempt (62 Stat. 701; 18 U.S.C. Secs. 401(3); 402) without regard to Section 10 of the Act.

A misstep by petitioner in the twilight area of everchanging Board rules could subject petitioner to far greater sanctions than are contemplated in the Act; the enforcement of such broad decrees by a court of appeals against all employers would make any subsequent unfair labor practice punishable by contempt. *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426 (1941); *Burr* v. *N.L.R.B.*, 321 F. 2d 612 (5th Cir. 1963); *N.L.R.B.* v. *Thompson Ramo Woolridge, Inc.*, 305 F. 2d 311 (7th Cir. 1962). The Board's practical sanctions would be converted from remedial to punitive. *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7 (1940).

3. In granting enforcement of the portion of the Board's order finding that petitioner's statements to employee Swoveland and employee Taylor were in violation of Section 8(a)(1) of the Act and that employee Farinella's discharge was in violation of the Act because of petitioner's hostility as inferred from petitioner's privileged Section 8(c) statements, the court of appeals has failed to apply Section 8(c) of the Act and is in conflict with the decision of the Court of Appeals for the Third Circuit in *N.L.R.B.* v. *Rockwell Mfg. Co.*, 271 F. 2d 109 (3rd Cir. 1959), with the Fourth Circuit in *N.L.R.B.* v. *Threads, Inc.*, 308 F. 2d 1 (4th Cir. 1962) and with the Tenth Circuit in *N.L.R.B.* v. *Colvert Dairy Products Co.*, 317 F. 2d 44 (10th Cir. 1963).

The Board's action as affirmed and sanctioned by the court of appeals, has emasculated Section 8(c) of the Act: the Board and the trial examiner found that petitioner's statements regarding union corruption and violence were not in violation of the Act but then used those privileged statements to transform other statements to Swoveland and

Taylor into Section 8(a)(1) violations when they otherwise would not have been in violation of the Act, and also used those privileged statements to infer that the discharge of Farinella violated Section 8(a)(3) and (1) of the Act.

Therefore, contrary to Section 8(c) of the Act, the court of appeals has permitted privileged statements to be used as evidence of an unfair labor practice. The court of appeals has sanctioned the transformation of petitioner's otherwise lawful conduct into violations of the Act through the use of petitioner's privileged statements.

The foundation for the Board's findings, as sanctioned by the court of appeals, is that petitioner was *against* unionization of its employees. This reasoning leads to the ultimate conclusion that the Board has determined that the petitioner should say nothing and be neutral, denying petitioner its right of free speech under the First Amendment to the Constitution and denying petitioner the benefit of Section 8(c) of the Act.

4. The court of appeals departed from the accepted and usual course of judicial review of Board orders under Section 10(e) of the Act in determining that there was substantial evidence on the record considered as a whole for the Board's finding that petitioner's "start from scratch" statements were made at the Yorktown warehouse and at *all* of the various Muncie stores: of the six Muncie stores, there was evidence of such a statement having been made only at Store No. 9.

The testimony before the trial examiner shows evidence of "start from scratch" statements only at the Yorktown warehouse and Muncie Store No. 9; the trial examiner's original report found evidence of such statements only at Yorktown and Muncie Store No. 9. (R.A. 19a)

However, in his supplemental report the trial examiner twisted his original finding and concluded that the "start

from scratch" statement was made at Yorktown and *all* of the Muncie stores. (R.A. 44a) The Board's decision, approved by the court of appeals, also concluded that such statement was made at *the various* Muncie stores. Not only was there no *substantial* evidence on the record as a whole to support this finding, there was *no* evidence whatsoever in the record to support it.

Additionally, the trial examiner found that several witnesses testified that petitioner told the employees: "if a union got in and we *started negotiations*, that everything would be wiped clean—all the benefits . . . ." (R.A. 19a) In his supplemental report, instead of resolving credibility, the trial examiner again twisted his original findings and found that petitioner's speeches ". . . stated in effect, among other things that if the Union won the election on April 21, Respondent's [petitioner's] employees would lose some of the benefits which they enjoyed. . . ." (R.A. 47a) All mention of contract negotiations was omitted. Petitioner's statement was converted from lawful to unlawful by the independent act of the trial examiner, the Board and the court of appeals.

5. The court of appeals upheld the Board's application of *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782 (1962) to petitioner's "start from scratch" statements even though that decision does not cover such statements while the Board's decision in *Schick Incorporated*, 118 NLRB 1160 (1957) and in *Universal Producing Company*, 123 NLRB 548 (1959) does cover and permit such statements of legal position by an employer where there was no anticipatory refusal to bargain statement made by the employer.

The actual holding of *Dal-Tex Optical Company, Inc.* was that an anticipatory refusal to bargain was no more lawful in the context of a matter involving objections to an election than it was in determining a violation of Section

8(a)(1) of the Act. That case does not apply to "start from scratch" statements, did not overrule *Schick* or *Universal Producing*, and its application to this case was therefore contrary to law.

If an employer is not permitted to inform his employees of the realities of collective bargaining negotiations, the employees are left with only the extravagant promises of immediate and increased benefits made by the campaigning labor organization. A representation election, as any democratic election, assumes an informed electorate. If the system denies information to the electorate, the system has been altered by administrative fiat.

This case presents an opportunity for this Court to settle and define the scope of the employer's freedom of speech in an election campaign. Certainly, an accurate statement of the legal and practical procedures involved in collective bargaining negotiations should not be a violation of the Act.

6. The court of appeals departed from the accepted and usual course of judicial review of Board orders under Section 10(e) of the Act in determining that there was substantial evidence on the record considered as a whole for the Board's finding that petitioner unlawfully interrogated employee Taylor.

After asking Taylor if he had any questions about the election, petitioner's supervisor said "Are you going to make the right vote?" and Taylor replied that he thought and hoped that he would. There was no evidence of coercion in such statement and no evidence that a revealing answer was sought; Taylor could answer "Yes" or "No" without feeling that he had been required to disclose his sympathies in fear of reprisal.

7. The court of appeals departed from the accepted and usual courses of judicial review of Board orders under

Section 10(e) of the Act in determining that there was substantial evidence on the record considered as a whole for the Board's finding that petitioner violated Section 8(a)(1) of the Act by making promises to employee Swoveland and such finding is contrary to law.

8. The court of appeals departed from the accepted and usual course of judicial review of Board orders under Section 10(e) of the Act in determining that there was substantial evidence on the record considered as a whole for the Board's finding that petitioner violated Section 8(a)(1) of the Act by making implied threats to employee Wulff and such finding is contrary to law.

9. The court of appeals departed from the accepted and usual course of judicial review of Board orders under Section 10(e) of the Act in determining that there was substantial evidence on the record considered as a whole for the Board's finding that petitioner violated Section 8(a)(1) and (3) of the Act by discharging employee Farinella and such finding is contrary to law.

Section 10(c) of the Act provides that the Board shall not require the reinstatement of any employee who was discharged for cause. After the Union lost the decertification election in April 1961, John Farinella's job performance began to steadily deteriorate so that by the date of his discharge he had ceased to function as a produce department manager. The evidence of Farinella's inadequate job performance which was the cause of his discharge is substantially undisputed in the record.

Therefore, it must be concluded that the Board and the court of appeals disregarded the statutory standard set forth in Section 10(c) and applied some other standard to this case. It is not clear what new standard has been applied; but it is clear that the statutory standard was not applied.

The Board and the court of appeals are not to assume the role of an arbitrator and weigh whether or not the penalty was too severe if there was, in fact, cause for the discharge. It may be that the Board and the court of appeals have imposed on petitioner the burden of proving something more than "cause" for Farinella's discharge because he was the local Union president. This, likewise, would not be proper since the statutory language applies to all alleged discriminatory discharges and does not give union officers permanent job tenure merely because they hold such office.

It is respectfully submitted that this court should redefine the meaning of "cause" for discharge and instruct the Board and courts of appeals to avoid assuming the role of an arbitrator and to apply the statutory test provided in Section 10(c) of the Act.

Conclusion

For the reasons stated it is respectfully submitted that this petition for certiorari should be granted.

William E. Roberts,
Robert A. Lichtenauer,
Counsel for Petitioner.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14202

SEPTEMBER TERM, 1963 SEPTEMBER SESSION, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

MARSH SUPERMARKETS, INC., *Respondent*.

December 20, 1963

On Petition for Enforcement of an Order of the National Labor Relations Board

Before HASTINGS, *Chief Judge*, KNOCH and KILEY, *Circuit Judges*.

KILEY, *Circuit Judge*. The Board seeks, under § 10(e) of the National Labor Relations Act,[1] enforcement of its cease and desist order against respondent which the Board found guilty of unfair labor practices at its Yorktown and Muncie, Indiana places of employment.

The union[2] lost a decertification election at the six Marsh stores in Muncie, and a representative election at its Yorktown warehouse. The union filed objections to the elections and subsequently the Board's General Counsel issued a complaint. The case before us is a consolidation of the issues in the objection and under the complaint.

The Board found that Marsh was guilty of unfair labor practices in violation of § 8(a)(1) of the Act and ordered

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[1] 61 Stat. 136 (1947), as amended 73 Stat. 519 (1959), 29 U.S.C. §§ 151 *et seq.* (1956).

[2] Local 1441, Retail Clerks International Ass'n, AFL-CIO.

both the Muncie and Yorktown elections set aside;[3] and further found that Marsh had violated §§ 8(a)(3) and 8(a)(1) of the Act by discharging employee Farinella and shortening the regular work hours of employee Wulff during a two week period.[4] 140 N.L.R.B. 899 (1963). The Board's order was entered in accordance with these findings.

Subsequent to the Board's order of January 28, 1963, a second election was held at Yorktown, on May 23, 1963. The union again lost the election, and the Board certified the result. Because this subsequent election was held and the result certified, respondent contends that portion of the Board's order with respect to its conduct at the Yorktown election of April 21, 1962, is moot. It relies on *General Engineering, Inc.* v. *NLRB*, 311 F. 2d 570 (9th Cir. 1962).

We are not persuaded that we should follow the *General Engineering* case which relied solely upon statements in *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947). Those statements beg the question of mootness and are concerned with procedure.

When the Board finds that unfair labor practices have been committed, it is entitled to have its order enforced by the courts to prevent repetition of that unlawful conduct in the future. Neither compliance with the Board's order, *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950), nor a subsequent certification of the union as bargaining representative, *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938), renders the cause moot.

In a factual situation close to the one at bar, the Second Circuit in *NLRB* v. *Clark Bros. Co.*, 163 F. 2d 373 (2d Cir. 1947), decided that the holding of a second election, as ordered by the Board, and the certification of an independent association as bargaining representative, did not render moot the question whether the company's conduct in the original election violated the Act. The Court said,

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[3] The Examiner had concluded that Marsh had violated § 8(a)(1) with respect to only the Muncie election.

[4] The Examiner found that Marsh had unlawfully shortened employee Wulff's working hours during a three week period.

162 F. 2d at 375, "The CIO will doubtless continue its organizational efforts and may hereafter petition for another election. If the court makes no decision as to respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction."

In the case before us if the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated. We conclude the Yorktown questions are not moot.

"To support its conclusion that Marsh violated § 8(a)(1) at both Yorktown and Muncie, the Board found speeches of Marsh's officials to employees at Muncie and Yorktown contained threats of loss of benefit and economic reprisal.[5] The statements found to have been made are that "if a union got in and we started negotiations * * *, everything would be wiped clean," and that the employees would lose some benefits, especially the existing vacation plan, and would have to "start from scratch."

The Board relied on its decision in *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962). Respondent relies upon the Board's decision in *Universal Producing Co.*, 123 N.L.R.B. 548 (1959). The "only specific language in the speech" in *Universal* is short of, and the language used by the "Employer's president" in *Dal-Tex* went farther than that before us. We cannot say the Board erred in concluding that the statements of respondent's official—which, in our view, fall between those in *Universal* and *Dal-Tex*—were not protected by § 8(c) and that they violated § 8(a)(1) of the Act. The Board could have reasonably inferred that the "listener-employees" took the statements as threats of loss of benefits and of economic reprisal. *Hendrix Mfg. Co.* v. *NLRB*, 321 F. 2d 100, 104 (5th Cir. 1963).

We think there is substantial evidence on the record as

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[5] § 8(c) of the Act, 29 U.S.C. §158(c) provides:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit."

as whole to support the Board's finding that Marsh's conduct interfered with, restrained and coerced its employees in violation of § 8(a)(1) of the Act, and that as a result both elections must be set aside.

There was substantial evidence also on the record as a whole to support the Board's findings that a "carry-out boy" was asked by a "district supervisor" whether he had any problems with which he needed help, or any questions about the election, and if he was "going to make the right vote;" that another employee was told that if the union was rejected she would have the benefit of less night work; and that employee Wulff was impliedly threatened with discharge for union activity through the profane and abusive language of Marsh's supervisor, Franklin, suggesting that she quit. The conclusion that such conduct violates § 8(a)(1) of the Act is not contrary to law.

These actions were not isolated from the totality of respondent's conduct, which according to the justified findings was not "a fair and friendly attitude at all times * * *" as in *NLRB* v. *Tennessee Coach Co.*, 191 F. 2d 546, 555 (6th Cir. 1951). Although the Board's findings are based on contradicted testimony we see no reason to disturb the resolution of the credibility of the witnesses as found by the Trial Examiner and the Board. *Sunshine Biscuits, Inc.* v. *NLRB*, 274 F. 2d 738, 741 (7th Cir. 1960).

We see no reason either to disturb the Board's conclusion that Marsh discharged produce manager Farinella for union activities, in violation of § 8(a)(3) of the Act. The findings on which the Board made its conclusion have substantial basis in the record as a whole and support the inference that Farinella was discharged not for reasons of inadequate job performance, but for union activity. Farinella, at the time of his discharge, had ten years seniority, the greatest seniority of any of Marsh's produce managers. He was president of the union, and the most active in union activities of any employee. A month before his discharge he was told of respondent's "disillusionment with him" as president of the union. The ostensible immediate reason for his discharge was the "poor condition of his department." But on the day of his discharge, the busiest day of

the week, he was without his assistant, had to help unload the produce truck, and was unable to finish placing the produce in the store. The officials first acted as though his firing depended on whether he asked for help. Neither Farinella nor his store manager was asked at that time whether he had. The Examiner credited Farinella's contradicted testimony that he had. In any event, whether he had or not was later said to be "beside the point." His store manager had not recommended, and had no previous knowledge of, the discharge as was normal company procedure.

We do not agree that respondent's "dollars per man hour" graph is proof positive of Farinella's job performance. There is nothing in the record to show that whatever information can be derived from the exhibit, which was not in existence at the time, was relied upon in discharging Farinella. We think the General Counsel could be found to have borne the burden, *Portable Electric Tools, Inc.* v. *NLRB*, 309 F. 2d 423 (7th Cir. 1962), of showing affirmatively by substantial evidence that Farinella was discharged for union activity.

We disagree with the Board's finding that respondent discriminated against employee Wulff, in violation of § 8(a)(3) of the Act, during the two week period before June 3, 1961. There is no substantial evidence, either in the testimony or in General Counsel's exhibit number six,[6] for finding that Wulff's straight-time had been reduced.

For the reasons given, we think the Board is entitled to the enforcement of its order, except as to the two week reduction of employee Wulff's straight-time hours before June 3, 1961.

The Board's order is enforced as modified.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

[6] A listing of the regular and overtime hours worked by Wulff, along with her weekly gross pay, during the period January-October, 1961.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14202

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

MARSH SUPERMARKETS, INC., *Respondent*.

January 10, 1964

DECREE

Before: HASTINGS, *Chief Judge*, KNOCH and KILEY, *Circuit Judges*.

THIS CAUSE came on before the Court upon the petition of the National Labor Relations Board for the enforcement of its order, dated January 28, 1963, against the above Respondent. The Court heard argument of respective counsel on November 18, 1963, and has considered the briefs and transcript of record filed in this cause. On December 20, 1963, the Court, being fully advised in the premises, handed down its opinion enforcing the Board's order as modified. In conformity with the Court's opinion, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Seventh Circuit that Respondent, Marsh Supermarkets, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Retail Clerks International Association, Local Union No. 1441, AFL-CIO, or in any other labor organization by discriminating against its employees in regard to their hire or tenure of employment, or the terms or conditions of their employment, or by

interrogating employees as to their union activities and promising benefits for withdrawing support of the Union.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act (hereinafter called the Act), or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to John Farinella immediate and full reinstatement to his former or substantially equivalent job, without prejudice to any rights and privileges previously enjoyed by him, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner set forth in the section of the Trial Examiner's Intermediate Report entitled, "The remedy." The backpay obligation of the Respondent shall include the payment of interest at the rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing and Heating Co.*, 138 NLRB No. 97.

(b) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due, plus interest as noted above, and the right of reinstatement as set forth in the section of the Trial Examiner's Intermediate Report entitled, "The remedy."

(c) Post at its office in Yorktown, Indiana, and in each of its six Muncie, Indiana, stores copies of the notice attached and marked, "Appendix." Copies of said notice to be furnished by the Regional Director for the Twenty-fifth Region (Indianapolis, Indiana), shall, after being duly signed by Respondent or its representatives, be posted by

the Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places in such offices and stores, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply herewith.

/s/ JOHN S. HASTINGS,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ WM G. KNOCH,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ ROGER J. KILEY,
Judge, United States Court of Appeals for the Seventh Circuit.

A True Copy:

Teste:

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix

Notice to All Employees

Pursuant to

a Decree of the United States Court of Appeals enforcing, as modified, an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in Retail Clerks International Association, Local No. 1441, AFL-CIO, or in any other labor organization of our employees, by discriminating against our employees in regard to their hire or tenure of employment, or any term or condition of employment.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named union, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities.

We Will offer John Farinella immediate and full reinstatement to his former, or substantially equivalent job, without prejudice to any rights and privileges previously enjoyed by him, and we will make him whole for any loss of wages suffered as a result of his discharge.

All our employees are free to become, remain, or refrain from becoming members of the above-named union or any other labor organization.

Marsh Supermarkets, Inc.
(Employer)

Dated: By ——, ——
(Representative) (Title)

Note: We will notify John Farinella if he is presently serving in the Armed Forces of the United States of his right to full reinstatement upon application, in accordance with the Selective Service Act, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana (Melrose 2-1551), if they have any question concerning this notice or compliance wtih is provisions.

APPENDIX C

The pertinent text of the parties of the National Labor Relations Act, 61 Stat. 136, as amended (29 U.S.C. secs. 151 et seq.) is as follows:

1. Section 7, National Labor Relations Act (61 Stat. 140; (29 U.S.C. sec. 157).

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

2. Section 8(a)(1), National Labor Relations Act (61 Stat. 140, as amended; 29 U.S.C. sec. 159(a)(1)).

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ."

3. Section 8(a)(3), National Labor Relations Act (61 Stat. 140, 73 Stat. 525; 29 U.S.C. sec. 158(a)(3)).

"(a) It shall be an unfair labor practice for an employer—

. . . . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

4. Section 8(c), National Labor Relations Act (61 Stat. 140; 29 U.S.C. sec. 158(c)):

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

5. Section 10(e), National Labor Relations Act (61 Stat. 146, as amended; 29 U.S.C. sec. 160(e)):

"(e) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person

named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

6. Section 10(e), National Labor Relations Act (61 Stat. 146, 72 Stat. 945, 73 Stat. 544; 29 U.S.C., sec. 160(e)),

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member,

agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such addition evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 25-RC-1865

MARSH SUPERMARKETS, INC., *Employer*,

and

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner*.

SECOND SUPPLEMENTAL DECISION

and

CERTIFICATION OF RESULTS OF ELECTION

On May 23, 1963, pursuant to a Decision and Order[1] issued by the Board on January 28, 1963, a second election by secret ballot was conducted in the above-entitled proceeding, under the direction and supervision of the Regional Director for the Twenty-fifth Region (Indianapolis, Indiana). Upon the conclusion of the election a tally of ballots was furnished the parties in accordance with the Rules and Regulations of the Board.

The tally of ballots shows that there were approximately 178 eligible voters and that 169 ballots were cast, of which 74 were for the Petitioner, 91 were against the Petitioner, and 4 were challenged.

On May 29, 1963, the Petitioner filed timely objections to the election. The Regional Director conducted an investigation of the various issues raised by the objections and, thereafter, on July 12, 1963, issued and served upon the parties his Report on Objections to Conduct Affecting Results of Election and Recommendations to the Board, and on July 15, 1963, an Errata thereto. In his report the Regional Director recommended to the Board that the ob-

[1] 140 NLRB No. 83.

jections and matters set forth in Additional Conduct Affecting the Results of the Election received in evidence during the investigation be overruled, and that a Certification of Results of Election be issued.

No exception to the Regional Director's report were filed by any of the parties within the time provided therefor. We, therefore, adopt the Regional Director's recommendations as contained in his report. The Petitioner's objections and the matters set forth in Additional Conduct Affecting the Results of the Election are hereby overruled.

As the Petitioner failed to receive a majority of the valid ballots cast, we shall certify the results of the election.

Certification of Results of Election

It is Hereby Certified that the majority of the valid ballots has not been cast for Local 1441, Retail Clerks International Association, AFL-CIO, and that the said Union is not the exclusive representative of the employees at the Yorktown, Indiana Food Center of Marsh Supermarkets, Inc., in the unit heretofore found by the Board to be appropriate, within the meaning of Section 9(a) of the National Labor Relations Act.

Dated, Washington, D. C.,

Frank W. McCulloch,
Chairman.

John H. Fanning,
Member.

Gerald A. Brown,
Member.

National Labor Relations Board.

(Seal.)